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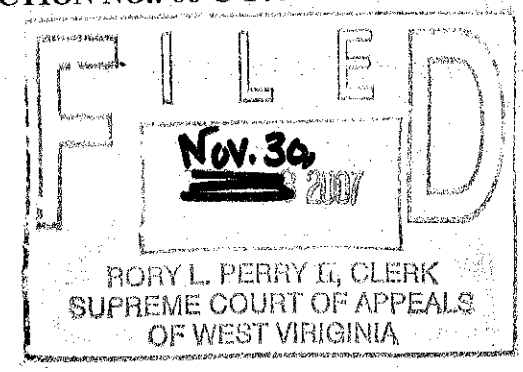
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

STEVEN W. CHIP DANTZIC,
DAVID SHAWN DANTZIC
KAREN SUSAN (DANTZIC) TUCKER-MARSH,
Appellants,

v.

CIVIL ACTION NO.: 06-C-144

TIMOTHY DANTZIC, Executor of the Estate of
Luetta Dantzic Emmart Miller,
TIMOTHY DANTZIC,
NATHAN DANTZIC,
CARLA EMMART,
DEBRA EMMART, and
KEYSER CHURCH OF THE BRETHREN,
Appellees.



REPLY BRIEF

Counsel of Record

HARLEY O. STAGGERS, JR.
and
DANIEL C. STAGGERS
STAGGERS & STAGGERS
190 CENTER STREET
P.O. BOX 876
KEYSER, WEST VIRGINIA 26726
(304) 788-5749
WV STATE BAR ID # 3552
WV STATE BAR ID # 3551

Counsel for the Defendant Timothy Dantzic, Executor of the Estate of
Luetta Dantzic Emmart Miller

JASON R. SITES

Counsel for Steven W. Chip Dantzic, David Shawn Dantzic
and
Karen Susan Tucker-Marsh

and

Robert Melody
Counsel for Keyser Church of the Brethren

DISPUTED FACTS

1. Appellees infer (page 3) that the Executor did not timely file an appraisement. Appellees are wrong.

2. Appellees assert that Appellant has paid attorney fees which exceed the amount in controversy (pages 4-5). Appellees are wrong.

3. Appellees assert that hiring of an appraiser to increase the value of their real property would benefit all of Mrs. Miller's children. However, Carla Emmart and Debra Emmart would not benefit (both are beneficiaries)[1]. Additionally, the Church of the Brethren would not benefit from the appraisal, and it is a beneficiary.

4. Appellees assert that Mrs. Miller clearly intended to change her will to reduce the shares of Carla and Debra Emmart, and her Church even though the second page of the will expressly thanks the Emmart's father (her husband) and expressly attributed the grace of God of helping the family through a difficult time. Appellants believe that Mrs. Miller's intentions are clear that she did not want to reduce Carla and Debra's share. Similarly, it is just as clear that Mrs. Miller had a strong faith in God and did not intend to punish her Church and reward the children she had not seen for years.

5. Appellees assert at page 17 that the word "estate" has only one meaning. Appellees are wrong. A common meaning of "estate" is property with a house on the property. (See Webster's Dictionary).

6. Appellees argue at pages 18-19, that the Executor had a duty to spend the estate's money to appraise their property. Appellant disagrees. Mrs. Miller's Church and her step-children are beneficiaries of the estate, but do not benefit from an increase of value to appellees' property.

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[1]Appellees assertion is misleading. Page 2 of Mrs. Miller's will states that the family made it with the help of "Harry". Mrs. Miller was married to Harry Emmart and Carla and Debbie are her step-children.

At page 13 of the March 26, 2007 hearing transcript, Appellees' lawyer asserted that the appraisement of Appellees' real property "is of no benefit to the Estate. It is of no benefit to the beneficiaries under the will. It is only relevant to the five people who now own the property." Appellees' argument to this Court is not only misleading, but directly opposite to Appellees assertion to the Circuit Court. There must be some duty of candor to both tribunals.

7. Appellees argue that a real estate agent listed the real property at more than double the appraised value of the residence. Appellees' argument is intentionally misleading. The residence was not the real estate the Court ordered to be appraised, even though the residence was the real property which passed through the will. Secondly, the residence had a buyer until Appellees filed their lawsuit. The property was subsequently listed with a realtor to avoid further accusations by Appellees. Unfortunately the residence has not sold. Since a Realtor is paid a percentage of the sale of the property, the "asking price" is pure speculation and does not represent the fair market value. The irony is that the Circuit Court ordered an appraisement of real estate outside the estate, but did not order an appraisement of the estate property.

8. Appellees' assertion that they are not able to sell their interest in the property until after the estate is final is false. Their property interest was obtained in 1987. Appellees have been free to appraise or sell their interest for twenty years.

ISSUE

1. Whether a will drafted by one who is not an attorney should be strictly construed to create partial intestacy.
2. Whether the legal presumption that Luetta Dantzic Emmart Miller intended to dispose of her whole estate was overcome by the use of the word "estate."
3. Whether the Circuit Court of Mineral County had jurisdiction to Order an estate to pay for the appraisement of non-estate property which was conveyed in 1987, prior to the death of Mrs. Miller.
4. Whether a Judgement on the pleadings should be granted prior to the opportunity to engage in discovery.

DISCUSSION

I. Mrs. Miller's Use of the Word "Estate"

Apparently Appellees now concede that if the word "estate" can be interpreted to mean Mrs. Miller's property with her residence, that such construction by the Court is mandated. However, now Appellees argue that the word "estate" is not a technical term and has only one meaning. Appellees are wrong. Any standard dictionary will define "estate" to also mean property with a residence on the property.

It is well established law in West Virginia that a nonlawyer's use of a word in her will can not be strictly construed. See *Matheny v. Matheny*, 182 W.Va. 790, 329 SE2d 230, page 233 (1990). Likewise, it is well settled law in West Virginia that a legal presumption exists against partial intestacy. See *Matheny supra*; *Kubicky v. Westbanco Bank Wheeling*, 208 W.Va. 456, 541 SE2d 334, syl. pts. 3 and 4 (2000); *Painter v. Coleman*, 211 W.Va. 451, 566 SE2d 588 (2002); and *Rubble v. Rubble*, 217 W.Va. 713, 619 SE2d 226 (2005).

Appellees failed to address why the legal presumption against partial intestacy should not apply to Mrs. Miller's will. Instead Appellees simply assert that Mrs. Miller's will is different from the wills previously reviewed by this Court.

Harrison on Wills notes that ordinarily a person has only one reason for making a will. That reason is to change the devolution of her property from the method prescribed by statutes. This Court has previously recognized the strong presumption that a person who writes a will intended to dispose of her entire estate. There is nothing within Mrs. Miller's will except the use of the word "estate" to suggest otherwise. Since "estate" has a common meaning which would prevent partial intestacy, the presumption against partial intestacy has not been overcome. The Circuit Court's reliance upon a 1911

case[2] was misplaced. The law has developed to recognize common sense over ancient rules.

Why would Mrs. Miller write a will to benefit the children she had not seen for over a decade at the expense of her children who cared for her? Similarly, what event changed Mrs. Miller's mind that her Church should not equally benefit from her estate?

The second page of Mrs. Miller's will clearly indicates that she had no intentions of favoring one group of beneficiaries over another. The clear meaning of Mrs. Miller's will was that she intended to dispose of all her property to all her beneficiaries. Mrs. Miller did not intend to favor beneficiaries who had turned their backs on her during her final days. Such a conclusion that Mrs. Miller would favor beneficiaries she had not seen for over a decade defies common sense.

II. Legal Presumption that Mrs. Miller Intended to Dispose of Her Entire Estate

Rastle v. Gamsjager, 151 W.Va. 499, 153 SE2d 403, syl. pt. 4 (1967) created a presumption that a person who prepares a will is presumed to have intended to dispose of her whole estate. Such a presumption should prevail unless the contrary shall plainly appear.

There is an absolute lack of any evidence to the contrary that Mrs. Miller intended to dispose of her whole estate by her handwritten will.

Appellees argue that Mrs. Miller's use of the word "estate" can only be interrupted to mean that she only intended to dispose of part of her estate. Although the use of the word "estate" could be interpreted to mean that Mrs. Miller wanted part of her estate to pass intestacy, such an interpretation does not overcome the presumption created by *Rastle*.

Rastle, syl. pt. 1, directs that if possible a will should be interpreted to avoid intestacy, and in such cases the context should control the words and not the words the context. When the *Rastle* rule of interpretation is applied to Mrs. Miller's will, the word "estate" is easily interpreted to avoid intestacy.

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[2] *Coberly v. Earle*, 60 W.Va. 295, 54 SE 336 (1911).

Rastle, syl. pt. 5, mandates that the Circuit Court must interpret the will by considering all of the provisions of the will as a whole, in their relation to each other, and in light of the circumstances which prompted Mrs. Miller to execute the will.

Without using the guidance of this Court, the Circuit Court ignored the legal presumption and rules of construction to find that Mrs. Miller clearly intended to die partially intestate. Such a ruling is wrong as a matter of law and should be reversed.

Appellees' response is devoid of any clear evidence to overcome the well established law of West Virginia except to argue that the law in 1911 still applies.

III. Jurisdiction

Appellees infer that Appellants should have filed a Rule 12(b)(1) motion. However, WVRCP, Rule 12(b)(1) does not require that the defense be asserted in the pleadings. There is no time period for filing such a motion under the West Virginia Rules of Civil Procedure. Whether a Rule 12 motion was filed has no relevance to this appeal

Appellees do not contest that this matter was before the Mineral County, County Commission. Likewise, Appellees acknowledge that their claims regarding all the issues within their civil action, were within the County Commission's jurisdiction.

West Virginia Rules of Civil Procedure, Rule 42 requires that a Circuit Court transfer the subsequent action to the Court in which the first action was commenced. Instead of following Rule 42, the Mineral County Circuit Court violated the Rule.

Article VIII, § 6 of the West Virginia Constitution also prohibits Circuit Courts from interfering with the jurisdiction of the County Commissions. Appellees argue that West Virginia Code § 55-13-4 et. seq. grants jurisdiction. Appellees are wrong.

Recently in *Haines v. Kimble*, Sup. Ct. No 32844, decided June 28, 2007, 2007 WL 1888358,

this Court addressed a dispute between the beneficiary of a will and the Executrix. In *Haines* the beneficiary filed a petition for removal of the Executrix, but the petition was filed with the County Commission, which was the proper procedure. After an adverse decision, the beneficiary filed an appeal. In the case *sub judice*, Appellees skipped the County Commission and went directly to a separate court.

Also Appellees argue, with respect to the ordered appraisement , that since they were in Circuit Court, "it was judicially efficient to handle this matter in a joined claim." Appellees ignore the mandate of Rule 42. Similarly Appellees ignore the inconvenient fact that the only reason this action was in the Circuit Court was because they wrongfully filed the action in violation of Rule 42. Of course the most "judicially efficient" course of action would have been to follow Rule 42, and appeal any subsequent adverse decision from the County Commission.

IV. Judgement on the Pleadings

Appellees argue (page 7 of Appellees' brief) that there is no time for discovery in a declaratory judgement action. Appellees then conclude that Appellant's discovery request were aimed at the majority of claims and were not important. (See page 8 of Appellees' brief.) Appellees characterize their motion for judgement on the pleadings as " a courtesy motion to clearly put the Appellant on notice that the Appellees intended to proceed in an effort to have the Circuit Court interpret the Will pursuant to the declaratory judgement action." Appellees' arguments are not supported by the law and Appellees do not cite any law to support their assertions.

West Virginia Code § 55-13-9 clearly states that when a declaratory judgement action involves the determination of an issue of fact, such an issue may be tried and determined in the same manner as any other civil actions in Circuit Court. In other words, when there is an issue of fact, the opposing party is entitled to discovery.

With respect to Appellees' pleadings, West Virginia Rules of Civil Procedure, Rule 8, requires a complaint to set forth a claim in a concise and direct way. Appellees' complaint and amended complaint contain multiple counts. There is no designation within the Rules of Civil Procedure which separate important claims and non-important claims.

Likewise, the "courtesy" Appellees were required to show Appellant was to follow the Rules of Civil Procedure and clearly put Appellant on notice with their complaint that the out-of-state beneficiaries only intended that the Will be interpreted. In an adversial proceeding there are no "courtesy" motions. The better practice is set forth within the West Virginia Rules of Civil Procedure. However, if "courtesy" motions did exist, Appellees' motion did not fit within the definition of courtesy. Instead of speaking with their brother, Appellees filed a lawsuit. Then Appellees within their lawsuit accuse Appellant of criminal behavior. Appellees behavior on its face appears to be mean spirited and greedy.

It was impossible for Appellant to discern exactly what Appellees' lawsuit involved. It appears now Appellees do not know the purpose of their action. Appellees now assert that discovery was not necessary since the only important issue was the interpretation of Will. However, Appellees' complaint and amended complaint fail to make that fact obvious.

The interpretation of Mrs. Miller's will turns on what meaning Mrs. Miller intended when she wrote that her "estate" consisted of her property, that being her house, along with the furnishings of the home. If Appellees' argument is that discovery could not lead to admissible evidence, then Appellees are wrong.

As discussed above, "estate" does mean property with a home on the property. Mrs. Miller's relationship with the beneficiaries whom Appellees argue were rewarded by the new Will, would be relevant to Mrs. Miller's intent.

Additionally, the mandated legal presumption that Mrs. Miller intended to dispose of her whole estate, and the legal mandate that the Circuit Court must interpret "estate" to avoid intestacy, make discovery important. According to case law, Appellees had the burden to overcome the legal presumption. Therefore Appellants had a right to discover Appellees' relationship with their mother.

Appellees' legal assertion that discovery is normally not allowed in similar cases is not supported by the Statue or Case Law. The Circuit Court erred by not allowing Appellant to obtain discovery.

Conclusion

Contrary to Appellees' contention, Appellees' pleadings clearly attack Tim Dantzic personally and accuses him of criminal action. Appellees blame Appellant for creating an adversial situation. Appellees use Appellant's Rule 11 motions as example of creating an adversial situation. However, West Virginia Rules of Civil Procedure, Rule 11(c) requires the motion to be served on the guilty party prior to filing the motion with the Court. The purpose of this Rule 11 provision is to allow the offending party to correct their mistakes. In the case *sub judice* Appellees did amend their pleadings after the first Rule 11 motion was served. Similarly, neither of the Rule 11 motions were filed with the Court. It was Appellees who disclosed the motions to the Court. Therefore, Appellees assertions are incorrect. Likewise, it was Appellees who rushed to court prior to communicating with their brother. A reasonable person would believe that it was Appellees who created the adversial situation. A review of Appellees' pleadings makes it clear that Appellees' lawsuit was filed to gain a few dollars from their step-sisters and their mother's church.

Appellees now argue that their brother should pay for the lawsuit they filed. Appellees also argue that even though the only issue which was to be resolved was the interpretation of Mrs. Miller's Will that this matter should be remanded for further hearing on the remaining issues. Appellees have

come full circle. Obviously, the issue is not just the interpretation of Mrs. Miller's Will. Appellees are attempting to get as much as possible from their mother's estate, regardless of their mother's intent and the law of this state.

The Circuit Court has indicated that if this matter is remanded, it intends to sanction Mr. Dantzic or Mr. Dantzic's attorney.[3] (See page19 of March 26, 2007 hearing) A fair resolution of this matter would be a reversal of the Circuit Court Order with specific directions to the lower court, to prevent unnecessary and unfair expenses from being assessed against Appellant.

PLAINTIFF
By counsel

Harley O. Staggers
STAGGERS & STAGGERS
P.O. Box 876
190 Center Street
Keyser, WV 26726
(304) 788-5749
WV State Bar ID #3552

Daniel C. Staggers
STAGGERS & STAGGERS
P.O. Box 876
190 Center Street
Keyser, WV 26726
(304) 788-5749
WV State Bar ID #3551

[3]See *Phares v. Brooks*, 214 WV 442, 590 S.E. 370 (2003) wherein Judge Jordan directed the successful Appellant to incur additional, but unnecessary legal expenses.

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DEBRA EMMART, and
KEYSER CHURCH OF THE BRETHREN,
Defendants.

CERTIFICATE OF SERVICE

I, Harley O. Staggers, Jr., a practicing attorney, hereby certifies that a true copy of **Reply Brief** and **Certificate of Service**, has been served by United States Mail, postage prepaid, on this the 30th day of November, 2007, upon the following:

Jason R. Sites
BARR SITES & CISSEL
P.O. Box 220
Keyser, WV 26726

Robert Melody
149 Armstrong Street
Keyser, WV 26726

Stephen Skinner
P.O. Box 487
Charlestown, WV 25414

Harley O. Staggers, Jr.
STAGGERS & STAGGERS
190 Center Street
P.O. Box 876
Keyser, WV 26726
(304) 788-5749
WV State Bar ID# 3552